BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35504

OPENING ARGUMENT AND EVIDENCE OF OLIN CORPORATION

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INTRODUCTION

Olin Corporation ("Olin") hereby submits its opening argument and evidence in opposition to the declaratory order sought by Union Pacific Railroad Company ("UP"). Olin also hereby adopts the arguments of the "Interested Parties" submitted in this proceeding.[1]

UP seeks a declaration from the Board that a unilaterally imposed indemnity provision, which places sweeping liability on shippers, is a reasonable term of service under 49 U.S.C. Sections 11101 and 10702. It appears the Board agrees with shippers that the declaration sought by UP would not terminate a present controversy; rather, the Board has stated it has exercised jurisdiction to "remove uncertainty."[2] Olin respectfully submits that allowing the indemnity provision sought by UP would result in greatly increased uncertainty and harm to the many industries and people in the United States that depend on TIH products.[3] On the other hand, a ruling by the Board that the indemnity provision is unreasonable would greatly increase certainty by avoiding the conflict and harm that would arise from allowing the indemnity provision to be included in public tariffs.

[1] The "Interested Parties" include The Fertilizer Institute ("TFI"), Chlorine Institute ("CI"), American Chemistry Council ("ACC") and National Industrial Transportation League ("NITL").
[2] Decision pp. 1,3, FD 35504, ID 41915 (Dec. 12, 2011).
[3] TIH (Toxic Inhalation Hazard) materials are chemicals that can be harmful when swallowed or inhaled and are one of nine classes of hazardous materials regulated by the U.S. Department of Transportation.

49 U.S.C. Section 11101(a) requires UP to "provide the transportation or service on reasonable request" and 49 U.S.C. Section 10702(a) places an obligation on UP to "establish reasonable rules and practices in matters related to that transportation or service." In determining what is "reasonable" under Sections 11101 and 10702, the Board has broad discretion.[4] Among the practices the Board has found unreasonable is that of "double dipping" through over-recovery of fuel surcharges, a practice similar to that of allowing UP's proposed indemnity provision without a reduction in rates commensurate to the liability shifting that is sought.[5] Although the Board has broad discretion, UP bears the burden of establishing the reasonableness of the indemnity provision, including that the requested declaration would reduce uncertainty.[6]

The Board should find the indemnity provision to be unreasonable because (1) UP's alleged justifications for imposing such broad liabilities on TIH shippers are unfounded and unsupported by any evidence or public policy; (2) its broad definition of "liabilities" contravenes fundamental principles of American law; (3) it places sweeping liability on shippers for risks that shippers cannot identify, mitigate or control; (4) for practical purposes, it contravenes and arguably supplants state and federal laws regarding allocation of liability, which have been carefully crafted over many decades through careful balancing of public policy concerns; (5) it creates uncertainty that could harm industry and employment in the United States; and (6) it fundamentally changes how contracts are negotiated and further decreases competition for captive shippers.

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[4] *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005).
[5] Decision, EP 661, ID 37341 (Jan. 26, 2007).
[6] Decision p. 4, FD 35504, ID 41915 (Dec. 12, 2011).

BACKGROUND

I. The indemnity provision at issue was not the result of a bargained for exchange between shippers and UP; rather, it was unilaterally imposed by UP in its public tariff through UP's unequal bargaining power.

Although the Board appears to have recognized that there is not a sufficient present controversy between UP and a shipper to justify a declaration, Olin will provide a brief background on the history of the tariff provision at issue as both UP and the Board have cited to it.[7] For more than a decade, SunBelt Chlor Alkali Partnership ("SunBelt") shipped chlorine under a private contract between UP, NS and SunBelt whereby chlorine was shipped from SunBelt's facility in McIntosh, Alabama via NS to New Orleans and then via UP from New Orleans to SunBelt's customer in LaPorte, Texas. The private contract had a negotiated indemnity provision that applied comparative negligence and did not require SunBelt to indemnify UP or NS for any liabilities that were not caused by the fault of SunBelt. In other words, the private contract followed state and federal laws regarding indemnity and allocation of liabilities, as did the UP tariff during this same time period.[8]

Near the end of the private contract, the parties engaged in extensive negotiations; however, an agreement could not be reached. One of the obstacles to reaching an agreement was the railroads' insistence on onerous indemnity terms that would have made SunBelt responsible for damages caused by third parties. On March 31, 2011, after the private contract expired, SunBelt began shipping under NSRQ 70319—a joint rate that did not contain any TIH indemnity provision; thus, it was governed by state and federal laws regarding indemnity and allocation of

[7] Olin has managed the logistics of SunBelt under contract since August, 1996. As such, Olin has firsthand knowledge of the facts regarding the negotiations between SunBelt, UP and NS.

[8] In the previous version of UP 6607, the last sentence of Item 60 stated "railroad and customer shall each be liable only for the amount of such liabilities allocated to that party in proportion to that party's percentage of responsibility."

liabilities. On April 11, 2011, twelve (12) days after SunBelt began shipping under NSRQ 70319, NS notified SunBelt that the applicable tariff rate would be published by UP in UPTF 4955.[9] UPTF 4955 incorporates the indemnity provisions contained in items 50 and 60 of UP Tariff 6607, which are the indemnity provisions at issue in this proceeding. On April 15, 2011, the Board issued a decision denying the request made by UP in EP 698 for a policy statement that a railroad can require a TIH shipper to accept responsibility for liabilities that are not caused by the negligence of the railroad.[10] On April 27, 2011, UP filed its petition with the Board seeking to open this declaratory order proceeding.[11]

UP alleges in its petition that the indemnity provisions at issue are "the product of an agreement that resolved a complaint that CI and ACC filed against UP in a Utah federal court in June 2009."[12] The lawsuit cited by UP was brought by CI and ACC against UP to challenge self-exculpatory indemnity provisions that UP unilaterally imposed in its tariff that was in effect at that time.[13] UP appears to cite this previous lawsuit in an attempt to legitimize the indemnity provision at issue before the Board by characterizing it as the product of compromise. Although UP has portrayed the indemnity provision as a product of compromise, this portrayal is disputed by CI and ACC.[14] In fact, Olin understands that the litigation, which was dismissed without prejudice, only dealt with the issue of UP unilaterally trying to force shippers to indemnify UP for UP's own negligence. Regardless of UP's alleged factual narrative of how the indemnity provision came to be, whether or not the indemnity provision was part of a settlement agreement

[9] For a more detailed history of the indemnity provision at issue, *see* Olin and SunBelt Reply pp. 2-3, FD 35504, ID 229518 (May 17, 2011).
[10] Decision pp. 3-4, EP 698, ID 41488 (April 15, 2011).
[11] UP Petition, FD 35504, ID 229403 (April 27, 2011).
[12] UP Petition pp. 3-4, FD 35504, ID 229403 (April 27, 2011).
[13] Pls.' Compl., *The Chlorine Institute, Inc. v. Union Pacific R.R. Co.*, Case 2:09-cv-00574-CW (D. Utah).
[14] While leaving any dispute over settlement of the lawsuit to the parties that were involved, Olin will point out that at the time of the lawsuit, UP 6607 did not impose broad liability on shippers for acts of third parties.

is ultimately irrelevant to determining its reasonableness because UP and trade groups cannot bind the Board or non-party shippers to any alleged agreement.

II. TIH materials, such as chlorine, are essential to countless industries and are an important part of the U.S. economy.

The Board has recognized the importance of TIH products. "TIH commodities are instrumental components of numerous commercial goods and services, such as the manufacture of pharmaceuticals, fertilizers, construction materials, and plastics, as well as the use of chlorine to provide safe drinking water to the public."[15] Olin is a producer of chlorine, an essential building block chemical with a vast array of applications and an important part of the U.S. economy. Chlorine chemistry is essential to everyday life. The products of chlorine chemistry make possible clean water and safe foods, pharmaceuticals, medical equipment, construction materials, computers, electronics, automobiles, clothing, sports equipment, agriculture, and much more. For the majority of these applications, there are no reasonable substitutes for chlorine.

In addition to the benefits derived from its applications, chlorine also benefits the economy. According to the Chlorine Institute, chlorine products and their derivatives contribute more than $46 billion to the U.S. economy each year. The chlor alkali industry alone contributes over $7 billion directly to the U.S. economy each year.

The safest way to transport chlorine is by rail. According to the Chlorine Institute, of the 1.5 million chlorine tank shipments since 1965, there have been 11 breaches of a tank car, representing only 0.00073% of all shipments.[16] This safety record demonstrates the reasonableness of transporting chlorine by rail. Indeed, the railroads concede that shipping by

[15] Decision p. 2, EP 698, ID 41488 (April 15, 2011).
[16] Chlorine Institute Briefing Paper, http://www.chlorineinstitute.org/files/PDFs/CICKitBriefingPaper121709.pdf (Dec. 2009).

rail is the safest way to move chlorine.[17] Chlorine producers, such as Olin, have also invested significant resources in enhancing safety. For example, chlorine producers have provided equipment and training to first responders throughout the United States to assist them in responding to potential incidents.

In sum, experience has shown transportation by rail to be the safest method of distributing chlorine to the many elements of society that depend on it. Policies that adversely affect the availability and affordability of chlorine for industries throughout the United States should be closely scrutinized because of the adverse affect they could have on the public good.

III. The UP indemnity provision should be strictly scrutinized given the railroads' desire to avoid shipping TIH materials in spite of the common carrier obligation.

The common carrier obligation of railroads has been a keystone of federal transportation policy for over a century.[18] As part of the common carrier obligation, Congress does not permit a railroad to refuse to transport a commodity based on its dangerous characteristics.[19] Further, a railroad may not refuse to provide services merely because to do so would be inconvenient or unprofitable.[20] Through public statements made by senior executives in previous Board hearings, railroads have made clear that they would refuse to transport TIH materials if not for the common carrier obligation.[21] Fortunately, the Board has rejected all such efforts by the railroads to date. Recognizing that the common carrier obligation cannot be directly avoided, railroads have indirectly tried to circumvent it. For example, UP recently sought a declaratory order from the Board that it did not need to provide shipper rates for the transportation of

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[17] *See e.g.* AAR Response pp. 1-2, EP 677_1, ID 222615 (June 13, 2008) (recognizing rail is the safest mode of transportation for TIH materials).
[18] *See e.g. Missouri Pacific Railway Co. v. Larabec Flour Mills Co.*, 211 U.S. 612 (1909).
[19] *Actiesselskabet Ingrid v. Central R. Co. of New Jersey*, 216 F. 72, 78 (2nd Cir. 1914).
[20] *GS Roofing Products Co. v. STB*, 143 F.3d 387, 391 (8th Cir. 1998).
[21] *See e.g* Oral Testimony by John M. Gibson. Norfolk Southern Corporation and James A. Hixon, Association of American Railroads made before Panel 1 in STB EP 677 (April 25, 2008).

chlorine where other chlorine producers were closer in proximity to the destinations of the shipments.[22] As another example, RailAmerica and several of its subsidiaries have recently placed onerous requirements on TIH shippers, including a $15,000 charge per train.[23]

Olin respectfully submits that the declaration requested by UP in this proceeding would allow the railroads to circumvent the common carrier obligation. Given that railroads would not ship TIH materials if not for the common carrier obligation, strict scrutiny should be given to any practice that could curtail a shipper's access to reasonable transportation. Because the indemnity provision at issue would effectively change state and federal law by placing sweeping liability on TIH shippers for risks that shippers cannot identify, mitigate or control, it would lead to increased uncertainty and costs for shippers that would essentially be forced to become insurers for the railroads. For these reasons, the Board should strictly scrutinize the indemnity provision at issue and find it unreasonable.

ARGUMENT

I. UP's allegations regarding justifications for imposing broad liability on TIH shippers are unfounded and unsupported by any evidence or public policy.

In its Petition, UP alleges that, in the unlikely event that an accident involving a TIH shipment were to occur, "UP would face potentially staggering liabilities because of the inherently dangerous nature of TIH."[24] This allegation echoes arguments previously made by the AAR that a railroad "faces 'bet the company' exposure each time a rail carrier is required to transport TIH materials."[25] UP has also stated in prior testimony to the Board that it "ranks the

[22] UP Petition, FD 35219, ID 224543 (Feb. 18, 2009).
[23] This surcharge and other practices intended to limit the shipment of TIH materials are the subject of the NOR 42129 proceeding that is currently open before the Board.
[24] UP Petition p. 5, FD 35504, ID 229403 (April 27, 2011).
[25] AAR Comments pp. 4-5, EP 698, ID 227858 (Sept. 25, 2010).

transportation of TIH chemicals as its most serious corporate risk."[26] Although there is no dispute as to the hazardous nature of TIH materials, Olin disputes the assertion that a rail carrier faces catastrophic financial ruin in the event of an accident involving TIH materials. UP's latest 10-K SEC filing does not make any disclosures to the effect that shipping TIH subjects it to "staggering liabilities" or that it is the company's "greatest corporate risk," as would be required if such allegations were true.[27] The simple truth is that no court has held the shipping of TIH by rail to be an ultrahazardous activity for which strict liability applies. Instead, railroads shipping TIH are only liable for damages to the extent caused by their own negligence or fault.[28] TIH has been shipped by rail since the 19th century without a single incident resulting in "staggering," "catastrophic" or "lose the company" liability for a railroad or chemical shipper. Such claims are simply not supported by any evidence that has been provided.

State and federal laws work together in many ways to limit a railroad's potential liability should a release of TIH materials occur. Where the railroad is not at fault in causing an incident, both federal and state laws protect the railroad from liability. For example, Congress has provided that railroads are not liable at common law for accidents involving discharge of TIH or other materials when they operate in accordance with governing federal safety standards and their own internal safety standards.[29]

Likewise, state tort systems would not impose liability on UP in instances where UP was not at fault. No court has held the transportation of TIH products to be an ultrahazardous activity that would subject a rail carrier to strict liability. To the contrary, courts that have addressed TIH

[26] UP Written Testimony, EP 677_1, ID 222858 (July 15, 2008).
[27] *See* Union Pacific Corp., Annual Report (Form 10-K) p. 10 (Feb. 4, 2011).
[28] *See* discussion and citations that follow in this Section I regarding limitations of carrier liability under state and federal laws.
[29] *See* 49 U.S.C. § 20106.

related activities, including manufacturing and transportation, have consistently held such activities are not ultrahazardous.[30] One of the principal rationales behind these decisions is that the risks associated with TIH materials can be effectively mitigated through reasonable cautionary measures.[31] History has proven the wisdom of this rationale as the National Transportation Safety Board has found maintenance or operational errors on the part of the railroads to have caused the three previous fatal tank car accidents involving TIH (in Minot, North Dakota; Macdona, Texas; and Graniteville, South Carolina).[32] Without negligence on part of the railroads involved in these incidents, no release of TIH would have occurred.

The only potential source of strict liability that Olin can identify as possibly applying to a railroad for an incident involving a TIH discharge is for certain environmental liabilities under CERCLA.[33] Even under CERCLA, the railroad would have several defenses in situations where the TIH discharge was caused by an act of war, an act of God or by a third party when the railroad exercised due care and took precautions against foreseeable acts.[34] Railroads have a complete defense in these situations when they have exercised due care with respect to the hazardous substance and have taken precautions against the foreseeable acts of third parties.[35]

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[30] *See e.g. Sprankle v. Bower Ammonia & Chemical Co.*, 824 F.2d 409, 414-16 (5th Cir. 1987) (holding that storage of anhydrous ammonia at a plant did not constitute an ultrahazardous activity); *Edwards v. Post Transp. Co.*, 228 Cal. App. 3d 980, 986-87 (Cal. Ct. App. 1991) (holding that transportation of sulfuric acid was not an ultrahazardous activity); *Erbrich Products Co. v. Wills*, 509 N.E.2d 850, 853-57 (Ind. Ct. App. 1987) (holding that use of chlorine gas in manufacturing bleach was not an ultrahazardous activity); and *Mehl v. Canadian Pacific Ry., Ltd.*, 417 F. Supp. 2d 1104, 1118 (D. N.D. 2006) (holding that claims for strict liability failed as a matter of law because the "North Dakota Supreme Court has given no indication that it would adopt strict liability for ultrahazardous or abnormally dangerous activities, nor has it indicated it would consider the transportation of anhydrous ammonia by rail to be an ultrahazardous activity").

[31] *Id.*

[32] *See* NTSB Accident Reports NTSB/RAR-05/04 PB2005-916304 (Graniteville, South Carolina), available at http://www.ntsb.gov/doclib/reports/2005/RAR0504.pdf; NTSB/RAR-04/01 PB2004-916301 (Minot, North Dakota), available at http://www.ntsb.gov/doclib/reports/2004/RAR0401.pdf; and NTSB/RAR-06/03 PB2006-916303 (Macdona, Texas), available at http://www.ntsb.gov/doclib/reports/2006/RAR0603.pdf.

[33] 42 U.S.C. § 9601 *et seq.*

[34] *See* 42 U.S.C. § 9607(b).

[35] *Id.*

The contours of the defenses under CERCLA demonstrate carefully thought out policy decisions that maintain the incentive for railroads to take reasonable measures for the hazardous materials that they transport. Allowing a railroad to unilaterally shift liabilities to a shipper would weaken the incentive that Congress has provided for in the CERCLA defenses.

Given the limitations placed on liability by state and federal laws, and the defenses that are available, it is difficult to determine the grounds for UP's allegation that it "would face staggering liabilities" if a TIH discharge were to occur absent the fault of the railroad. Furthermore, the three tragic incidents involving loss of life that have occurred in the past decade involving TIH materials have not resulted in insurmountable liabilities for the railroads involved, despite the fact that those incidents were caused by the railroads' own negligence. In each case, the railroads involved were the only party in a position to avoid such incidents.

Olin anticipates that the railroads and their interest groups will cite alleged costs and difficulties associated with obtaining insurance as justification for the indemnity provision at issue. To date, and despite requests from the Board in prior proceedings, Olin is unaware of any evidence presented by the railroads to support allegations regarding the costs or unavailability of adequate insurance. The burden of proof on any such allegations must be met with actual evidence from the railroads, assuming such evidence exists. Evidence available in the public domain does not support UP's allegations regarding inadequate or unavailable insurance. As noted previously herein, UP's latest 10-K SEC filing does not disclose to investors any risk of exposure to liabilities from lack of insurance coverage for a TIH release.[36] As another example, Berkshire Hathaway (NYSE: BRK.A and BRK.B), holding company for one of the largest insurance and reinsurance companies in the world, recently concluded the largest deal in its

[36] *See* Union Pacific Corp. Annual Report (Form 10-K) p. 10 (Feb. 4, 2011).

history by acquiring Burlington Northern Santa Fe ("BNSF") for $26 billion in cash and stock. The Board could reasonably view this deal as evidence against the railroads' allegations, as Berkshire Hathaway would not have acquired BNSF if it had exposure to "bet the company" risks and "catastrophic" liabilities because of alleged inadequate insurance coverage.

Because UP bears the burden of establishing the reasonableness of the indemnity provision, it cannot meet its burden without producing evidence to support its allegations regarding insurance premiums. The Board should allow for sufficient discovery into any allegations regarding insurance premiums to establish the extent, if any, to which such evidence exists. If the railroads do not produce sufficient evidence to prove these allegations, UP will be unable to meet its burden and the indemnity provision must be held to be unreasonable.

Olin has previously discussed a concept whereby Olin would negotiate to compensate a railroad for increased insurance premiums validated as true incremental costs associated with moving Olin's TIH materials.[37] Olin is willing to continue discussions on this concept should the railroads produce evidence supporting their allegations regarding insurance premiums. To date, the railroads have not responded to this offer. Olin believes that the best way to resolve the liability issue is to first resolve the issue of insurance coverage and premiums. Doing so would avoid the uncertainty presented by the indemnity provision at issue and would be the cleanest and simplest way to assist the railroads in dealing with any alleged increases in insurance premiums. If, however, the UP indemnity provision is upheld, this process will not be possible.

Regardless of any allegations by UP attempting to justify the indemnity provision at issue, the scope and breadth of the indemnity provision far exceed any alleged justifications. In addition to its unreasonable scope, the indemnity provision would conflict with established laws

[37] *See* Olin Comments pp. 3-4, EP 698, ID 227865 (Sept. 24, 2010).

and would result in significant uncertainty and harm to industries if it were allowed. For these reasons, the indemnity provision is unreasonable.

II. The indemnity provision is unreasonable because its broad definition of "liabilities" contravenes fundamental principles of American law.

In considering the sweeping breadth of the indemnity provision, consideration must first be given to the everything-but-the-kitchen-sink definition of "liabilities." The term "liabilities" is defined in Item 50[c]1 as follows:

> CLAIMS, LIENS, CAUSES OF ACTION, SUITS, DEMANDS, LOSSES, DAMAGES (INCLUDING WITHOUT LIMITATION SPECIAL AND CONSEQUENTIAL DAMAGES), COSTS, FINES, PENALTIES, JUDGMENTS, EXPENSES (INCLUDING WITHOUT LIMITATION ATTORNEYS' FEES, COSTS OF COURT AND OTHER LEGAL OR INVESTIGATIVE EXPENSES, CONSULTING FEES, COSTS OF REMEDIATION, COSTS OF EMERGENCY RESPONSES AND EVACUATIONS, AND GOVERNMENT OVERSIGHT COSTS), SUITS, CLAIMS OF ENVIRONMENTAL EXPOSURE AND NATURAL RESOURCE DAMAGES (COLLECTIVELY, *"LIABILITIES"*).

As a clear example of the unreasonableness of the indemnity provision at issue, this definition of "liabilities" contravenes fundamental principles of American law regarding allocation of costs and fees. Under the "firmly entrenched" American rule, each party is required to bear its own litigation expenses, including attorney's fees, regardless of whether it wins or loses.[38] Narrow exceptions to this rule, such as where a statute applies or the parties have agreed otherwise through contract, do not apply here; therefore, it is unreasonable to unilaterally impose such a term through a public tariff.[39]

The indemnity provision is not only unreasonable because of the cost-shifting of attorney's fees and costs, it is also unreasonable because of other types of damages and expenses

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[38] *Fox v. Vice*, __U.S. __131 S. Ct. 2205, 2213 (Jun. 6, 2011) (citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).
[39] *See id.*

it includes. For example, the indemnity provision specifically states that a shipper is liable for special and consequential damages, which otherwise may not be recoverable. Special and consequential damages are damages assessed in breach of contract actions between contracting parties where such damages were proximately caused by the breach of the contract, and where such damages were within the contemplation of the parties, or reasonably foreseeable, at the time the contract was entered into.[40] The indemnity provision strays from this concept by making the shipper liable for such damages regardless of any causal relationship between the shipper's conduct and the damages, and regardless of the foreseeability of such damages. In addition to its broad definition of "liabilities," the UP indemnity provision is also unreasonable because, as discussed in greater detail below, it would force shippers to become insurers of the railroad for acts of third parties and acts of God, over which shippers have no control.

III. The UP indemnity provision is unreasonable because it places sweeping liability on shippers for risks that shippers cannot identify, mitigate or control, essentially making the shipper an insurer for the railroad.

Item 50[c]1 of the UP indemnity provision at issue provides that the railroad will indemnify the shipper for "liabilities" "arising from railroad's sole negligence or fault . . ." Thus, the railroad's obligation to indemnify the shipper is limited to only "liabilities" that the railroad has caused. On the other hand, the sweeping indemnity obligations placed on the shipper are vastly broader in scope. Item 50[c]2 provides that the shipper will indemnify the railroad for "any and all liabilities except those caused by the sole or concurring negligence or fault of railroad." The only exception to this catch-all indemnity provision is where liabilities arise from the fault of another rail carrier that participated in the movement. Thus, Item 50[c]2 requires the shipper to indemnify the railroad for <u>any</u> "liabilities" not caused by the railroad.

[40] 24 *Williston on Contracts* § 64:12 (4th ed. 2002).

Such "liabilities" would include, but not be limited to, those caused by third parties, acts of God, and those imposed through strict liability.[41] These liabilities could include significant liabilities such as environmental damages for spilled fuel or cargo or personal injury damages for harm to bystanders. Further, there is no limitation on whether or not the "liabilities" were even caused by a TIH release, as the catch-all provision simply states that shipper is liable for "any and all liabilities" other than those caused by the railroad. Simply by shipping under the tariff, the shipper is obligated to indemnify the railroad for any number of "liabilities" that may arise, essentially making the shipper an insurer of the railroad.

Item 60[c] places a similarly one-sided indemnity obligation on the shipper. Item 60[c] covers situations where the railroad and the shipper are both at fault. In such circumstances, the railroad's liability is limited to the extent of its percentage of responsibility, whereas the shipper is "liable for all other liabilities," which would include, among others, liabilities caused by third parties and acts of God. This indemnity obligation applies even if such third parties are financially able to pay for the damages they cause.

Further, this indemnity obligation applies regardless of whether UP could assert valid defenses to any claims brought against it. This obligation to indemnify the railroad for liabilities caused by third parties without regard to their ability to pay and without regard to whether the railroad could assert valid defenses to claims brought against it demonstrates that the effect, if not the intent, of the indemnity provision is to make the shipper an insurer for the railroad. However, under the UP tariff, the shipper (as insurer of liabilities caused by third parties) would

[41] In its decision opening this proceeding, the Board correctly recognized that the indemnity provision at issue includes the obligation for shippers to indemnify UP for "liabilities resulting from the negligence or fault of shippers themselves, the negligence or fault of third parties, or from acts of God." Olin would point out that these are merely examples of liabilities, and that the actual tariff indemnity uses the open ended phrase "customer shall be liable for all other liabilities." Thus, the shipper's indemnity obligations are not limited to those listed by the Board and have no correlation to causation, fault, foreseeability or fairness.

not even have the basic right of an insurer to investigate and defend such a claim as the railroad could settle any claim for any amount without shipper consent, and simply make a claim for the amount of settlement against the shipper.

Such broad indemnity obligations that are not even contingent on liabilities being caused by a release of TIH product are clearly unreasonable. Even if UP's alleged justifications for shifting liability to TIH shippers were reasonable (a premise that Olin strongly contests herein), the almost limitless scope of the indemnity provision at issue would far exceed any such justifications and, therefore, the indemnity provision is unreasonable.

For example, assume a situation in a rural community where a non-UP train negligently collides with a UP train transporting TIH material under UPTF 4955. The non-UP railroad admits liability for the collision and pays to settle with local landowners who allege some property damage due to the collision. Despite the negligence of the non-UP railroad and the lack of fault by the shipper, and without consideration of the non-UP railroad's ability to pay for any damages it has caused UP, the shipper is required under Item 50[c]2 to indemnify UP for any liabilities incurred by UP, including costs of responding to the incident, legal fees and investigative fees. More alarmingly, the broad definition of "liabilities" would require the shipper to indemnify UP for any special and consequential damages caused by the collision. Even though UP may have a cause of action against the non-UP railroad, UP could simply decide to pursue recovery against the TIH shipper under Item 50[c]2.

A similar outcome could occur under Item 60 in a situation where the shipper and railroad had some small percentage of fault, but a third party had the majority of fault. For example, given the previous scenario, assume that there was a minor discharge of TIH that did not cause any material injury or damage. Further, assume that a lawsuit was brought and a

judgment was issued whereby it was determined that the non-UP railroad was 80% at fault, and UP and the shipper were each 10% at fault. Again, regardless of any cause of action UP may have against the negligent railroad, UP could choose to recover its costs, fees and expenses (including special and consequential damages) directly from the shipper pursuant to Item 60[c].

Placing potential liability on a shipper for acts of third parties and acts of God is particularly unreasonable considering that a shipper loses all control of its product once it places its product in the custody of the railroad. At that point, the railroad is the only party in a position to mitigate the risks associated with transport because it exercises control over the shipment. Shippers acknowledge that railroads have worked hard to increase the safety of transportation, but there is still room for improvement. For example, safety failures by railroads were the cause of the three previous fatal tank car accidents involving TIH.[42] Although items 50 and 60 are not self-exculpatory, in that UP is not relieved of liabilities resulting from its own negligence, from a public policy perspective, their indemnity is even worse than a self-exculpatory clause in that they place liability on the shipper for events the shipper cannot identify, mitigate or control. In a self-exculpatory clause, at least the indemnitee (UP in this case) could control its own conduct.

Allowing the railroads to unilaterally impose broad indemnity provisions on shippers would take an important safety incentive away from the railroads, which is one of the primary functions for established systems of fault allocation under state and federal laws.[43] As between a

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[42] *See* NTSB reports cited in Section I, *supra.*

[43] See *Scott v. American Tobacco Co., Inc.*, 830 So.2d 294, 300 (La. 2002) ("the court's determination of whether reducing the injured party's recovery through a comparative fault allocation will serve as an incentive for a similarly situated person to exercise care or, in contrast, operate to reduce the incentive of the owner of the thing at issue to remove the risk of harm"); *see also Hall v. E.I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353, 368 (D.C.N.Y. 1972) (stating that, in the realm of products liability, "[a] rigorous rule of liability with enhanced possibilities of large recoveries is an 'incentive' to maximize safe design or a 'deterrence' to dangerous design, manufacture, and distribution"); *see also* Richard A. Posner, *The Economic Structure of Tort Law* 190-91 (1987) (stating that relative

shipper that has no control over its product once it is tendered to the railroad, and the railroad that exercises control over the locomotive and tracks, it makes sense for the party that is in the better position to mitigate risks associated with transportation to be responsible for such risks. As discussed below, these issues have been analyzed for decades by state and federal courts and legislators that are better situated to make such public policy decisions than are railroads through issuing a tariff.

IV. Allocation of fault and liabilities should be left to state governments that are better positioned to consider the public policy concerns that are implicated.

State judicial and legislative bodies have vast experience in evaluating allocation of liability while considering the public interest.[44] Careful attention to public policy concerns—such as fairness, economics, manageability, etc.—have resulted in intricate laws regarding allocation of liability.[45] State laws reflect thoughtful decisions as to when carrier liability should be limited. For example, one of the defenses to strict liability provided under the Restatement of Torts is if defendant's "activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier."[46]

The law concerning enforceability of indemnity provisions has also been well developed in many jurisdictions. In most jurisdictions, indemnity provisions, such as that which is at issue in this proceeding, are unenforceable as a matter of law in situations when there is unequal

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fault allocation systems are doctrines producing efficient safety incentives when applied to cases requiring both injurers to take care thus achieving optimal accident avoidance).

[44] *See e.g. Licenberg v. Issen*, 318 So.2d 386, 391 (Fla. 1975) (providing multiple examples of states that carefully tailored their respective fault allocation principles to conform to each individual states' unique principles of fairness and justice) (citing *Ellis v. Chicago & N.W. Ry. Co. et al.*, 167 N.W. 1048 (Wis. 1918); *Rush v. Korth*, 86 N.W.2d 464 (Wis. 1957); and *Davis v. Broad Street Garage*, 232 S.W.3d 355 (Tenn. 1950)).

[45] *See e.g. McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992) (stating that principles of fairness, efficiency, and manageability present under Tennessee law required the court to establish a system of comparative fault in Tennessee); *Licenberg*, 318 So.2d at 393 (finding that the Florida Legislature's adoption of the Uniform Contribution Among Tortfeasors Act was a result driven by "several difficult questions of policy").

[46] Restatement (Second) of Torts § 521 (1977).

bargaining power and when the terms of the provision are not freely negotiable.[47] Given the fact that a shipper has no bargaining power with respect to a unilaterally published public tariff, it is unlikely that the indemnity provision at issue would be enforceable under many states' laws. Because the indemnity provision would likely be unenforceable under many states' laws, it is unreasonable for UP to impose such a provision through a tariff. Moreover, a Board decision determining the proposed indemnity language to be reasonable would greatly increase uncertainty. If a state or federal court decided to strike down the UP indemnity provision, would the railroads begin filing indemnity collection actions with the STB?

In the reply comments to UP's initial petition to open this proceeding, several shippers voiced concern regarding the potential effect of a Board decision on state law.[48] Concerns were also raised that a ruling on the reasonableness of the indemnity provision would amount to merely an advisory opinion.[49] The Board responded to these concerns by severing the issue of enforceability under state law from the issue of reasonableness of the indemnity provision under the ICA.[50] Although these issues may be conceptually severable, Olin respectfully submits that the two issues are not practically severable and must be considered together. In practical effect, the approval of this indemnity tariff would lead to significant conflict with existing federal and state laws.

Further, assuming *arguendo* that the Board decided that the indemnity provision was

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[47] *See e.g. Moxley v. Pfundstein*, __F.Supp.2d__, 2011 WL 2728354 (N.D.Ohio 2011) (applying Ohio law); *Valhal Corp v. Sullivan Associates, Inc.*, 44 F.3d 195 (3rd Cir. 1995) (applying Pennsylvania law); *DelRaso v. U.S.*, 244 F.3d 567 (7th Cir. 2001) (applying North Carolina law); and *Kansas City Power & Light Co v. United Telephone Co. of Kan.*, 458 F.2d 177 (10th Cir. 1972) (applying Kansas law); *see also* discussion and citations in Olin Comments 1-2, EP 676, ID 222327 (May 12, 2008).

[48] Dyno Nobel Inc. Reply pp. 2-3, FD 35504, ID 229524 (May 17, 2011); FI, CI and ACC Reply pp. 5-6, FD 35504, ID 229520 (May 17, 2011).

[49] FI, CI and ACC Reply pp. 4-5, FD 35504, ID 229520 (May 17, 2011).

[50] Decision p. 4, FD 35504, ID 41915 (Dec. 12, 2011).

reasonable, the railroads would undoubtedly argue in potential future litigation that state law is preempted by the Board's decision. Thus, the Board's decision in this proceeding could be argued to abrogate carefully developed federal and state laws regarding liability sharing and indemnity obligations. Shippers, on the other hand, would point to language of 49 U.S.C. §10501(b) as proof that state law is not preempted.[51]

Rather than removing uncertainty, a decision by the Board finding the indemnity provision to be reasonable would only fuel future controversy and future litigation regarding the interplay of the Board's decision with existing state laws and public polices. Although the Board has opined that such a decision is within its jurisdiction, the jurisdictional limits of the Board define only what it can do, not what it should do.[52] If the Board's intent is to remove uncertainty, Olin respectfully submits the only way to do so is by determining that the UP indemnity provision is unreasonable. While the Board undoubtedly has greater expertise than state governments in rail transportation issues, allocation of fault and indemnity are better left to state governments.

V. UP's proposed indemnity provision would create uncertainty that would harm industries in the United States.

In addition to the uncertainty that would arise regarding enforceability of the indemnity provision at issue, additional uncertainty would result from a decision by the Board holding the indemnity provision to be reasonable. First, railroads have alleged in several proceedings, without supporting evidence, that liability shifting is necessary because of their inability to

[51] Indemnity and tort allocation do not fall under the areas where the Board has been given exclusive jurisdiction such as "rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers . . . etc."

[52] Olin does not concede that a Board ruling approving an indemnity provision that arguably contravenes state laws and public policies is within its jurisdiction. However, Olin will not beleaguer this proceeding with the issue of the Board's jurisdiction, but will reserve the right to challenge the Board's jurisdiction in an appropriate forum pending the outcome of this proceeding.

obtain adequate insurance. Assuming *arguendo* this assertion is true,[53] shifting liabilities to shippers as provided in the UP tariff would also shift the cost of insurance to the shippers. Given that railroad liability insurance costs are already incorporated into shipping rates, shifting of "liabilities" without a reduction in rail rates or another commensurate economic benefit would amount to double dipping by the railroads, a practice recently banned by the Board in the rate based fuel surcharge proceeding.[54]

If railroads are permitted to impose the UP indemnity provision on shippers, it is not hard to imagine that the next steps for railroads will be to publish tariffs that impose financial assurances and guarantees for such indemnity. The likelihood of this scenario is demonstrated by the Canadian Pacific ("CP") tariff for TIH products that requires shippers to carry ten million dollars of comprehensive general liability coverage.[55] CP also recently increased its surcharge on TIH railcars to $1,500 per railcar per day.[56]

The possibility of similar actions by U.S. railroads is a significant concern that would create uncertainty if the UP indemnity provision was allowed. Because the railroads claim they cannot obtain "adequate" liability insurance, it would seem obvious that shippers would be unable to obtain insurance that was "adequate" in the view of the railroads. Railroads could then circumvent their common carrier obligations by refusing to transport products for shippers that could not provide the financial assurances that the railroads subjectively deemed necessary. Thus, railroads would not only have a mechanism to avoid their common carrier obligations to ship TIH, they would also have the market power to refuse to deal with TIH shippers, and to

[53] Section I, *supra*, challenges this assertion.
[54] *See* Decision, EP 661, ID 37341 (Jan. 26, 2007).
[55] Tariff 8, Item 53, available at http://www.cpr.ca/en/customer-centre/tariffs/supplemental-services/Documents/tariff8-hazardous-commodities.pdf.
[56] *Id.* at Item 3.

decide whether a shipper can continue its business or whether it must shut down. Giving railroads this power[57] would impact the competitive balance in the chemical markets, cause employment losses and create substantial uncertainty that currently does not exist.

VI. Approval of UP's proposed indemnity provision would fundamentally change how contracts are negotiated and further reduce competition for captive shippers.

Given that railroads are natural monopolies, they have long been the subject of government regulation.[58] Although the Staggers Act significantly reduced regulation of the rail industry, it retained a "regulatory backstop" for captive shippers whereby railroads are required to issue a tariff upon demand from a captive shipper and the shipper can bring a case for rate relief if certain conditions can be established.[59] In many instances, shippers and railroads enter private contracts for transportation, which are outside of the Board's jurisdiction. These contracts may contain terms and conditions that differ substantially from those contained in public tariffs. However, in instances where an agreement cannot be reached, the "regulatory backstop" ensures that shippers can obtain a public tariff, thereby enforcing the common carrier obligation of the railroads.

If railroads are allowed to impose broad indemnity provisions on shippers through tariffs, such indemnity terms would undoubtedly become the baseline for any future contract negotiations with the railroads. For captive shippers, this is especially problematic as the only competition for a contract with a particular railroad is a tariff with the same railroad. Thus, a shipper would lose one of the few bargaining tools available to it when negotiating with a

[57] The Class I railroads are presently defendants in a lawsuit brought against them for violating antitrust laws by agreeing to impose fuel surcharges on numerous shippers. *See Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869, Misc. No. 07-0489 (PLF/AK/JMF).

[58] By passing the Interstate Commerce Act in 1887, Congress made the railroads the first industry in the United States subject to federal regulation.

[59] The effectiveness of the regulations governing rate challenges has been heavily criticized by shippers, including Olin. *See e.g.* Olin Comments, EP 705, ID 229183 (April 11, 2011).

railroad and the dominant bargaining power of the railroad would be further enhanced.

Railroads already benefit from antitrust exceptions and immunities and do not need the further benefit of one-sided indemnity provisions. For example, under the *Keogh* doctrine, railroads are immune from treble damages for filed rates.[60] A more comprehensive list of antitrust immunities and exceptions granted to railroads can be found in the comments by the ABA Section of Antitrust Law that were submitted to Congress in 2008.[61] In addition to these immunities and exceptions, the railroads now want to be allowed to unilaterally impose one-sided indemnity provisions on TIH shippers, many of which are captive. In other industries, such indemnity provisions would only be available through bargained-for exchanges, and an industry-wide attempt to impose such terms would raise serious antitrust concerns. Railroads should not be given the power to impose indemnity terms through tariff that would only be available through contract in other industries.

Allowing railroads to unilaterally impose broad indemnity obligations on captive shippers would, therefore, fundamentally alter contract negotiations by imposing an indemnity baseline that significantly weakens shippers' already tenuous bargaining position. Shippers would not have the benefit of the "regulatory backstop" because the tariff would offer no alternative to the indemnity terms offered by contract. The railroads' monopoly power over captive shippers would be increased, resulting in even less competition. Given the benefits already afforded to railroads through antitrust exemptions and immunities, the Board should find the indemnity provision is unreasonable.

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[60] *Keogh v. Chicago N.W. Ry. Co.*, 260 U.S. 156 (1922).

[61] ABA Section of Antitrust Law, *Comments on the Railroad Antitrust Enforcement Act* (submitted to Congress Dec. 2008).

CONCLUSION

There is no evidence or public policy to justify the sweeping indemnity tariff imposed unilaterally by UP. No court has held shipping TIH by rail to be an ultrahazardous activity and railroads are only liable in tort for damages caused by their own negligence or fault, a reality upon which insurance underwriting is based. The indemnity tariff sought by UP is unreasonable because it would place sweeping "liabilities" on shippers for risks that shippers cannot identify, mitigate or control; contravene long-standing state law principles regarding allocation of liabilities and cost shifting; and create substantial uncertainty and future litigation that could adversely affect industries in the United States. Further, the justifications for imposing such sweeping "liabilities" on shippers are unfounded given limitations that currently exist on carrier liability and the fact that carriers are better positioned to identify, mitigate and control risks associated with the transportation of TIH commodities.

For these reasons, the Board should greatly reduce uncertainty on these issues by clearly stating that UP's tariff is unreasonable, thereby avoiding issues such as tort liability allocation, insurance underwriting, financial assurances, preemption issues related to conflicts with state laws, and anticompetitive impacts of the tariff at issue.[62] Moreover, such a ruling would improve the resolution of rate cases brought before the Board, which are complicated by uncertainty relating to the ability of railroads to force broad indemnity obligations on shippers.

Olin remains open to the idea of risk sharing; however, any such arrangement can only be reached through equal bargaining, not through a unilaterally imposed tariff. Olin believes this to be the preferred resolution by the Board as well. As stated by the Board in EP 698, "[w]e were

[62] If the indemnity provision was not held to be unreasonable, Olin respectfully submits that it would be arbitrary and capricious for the Board to allow the UP indemnity provision without ordering reductions in TIH shipping rates commensurate with the shifting of "liabilities" from the railroad to the shipper.

(and still are) of the view that a collaborative resolution of this issue by interested stakeholders might well be superior to one this agency imposed by regulatory fiat."[63] Olin hopes the Board will recognize that allowing UP's indemnity provision would be little more than regulatory fiat endorsing UP's unilateral imposition of broad "liabilities" on shippers.

For these reasons, Olin respectfully requests that the Board determine that UP's indemnity provision is unreasonable and cannot be included in its public tariffs.

Respectfully submitted on behalf of the Olin Corporation by:

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[63] Decision p. 2, EP 698, ID 41488 (April 15, 2011).

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2012, I caused a copy of the foregoing document to be served by e-mail on all Parties of Record in this proceeding.

/s/ Gregory M. Leitner
Gregory M. Leitner, Esq.